

**French Connectin Holdings, Inc. v Omabuild Corp.**

2008 NY Slip Op 33700(U)

January 3, 2008

Supreme Court, New York County

Docket Number: 115950/06

Judge: Marilyn Shafer

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6

**SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY**

**PRESENT: HON. MARILYN SHAFER**  
*Justice*

**PART 8**

**FRENCH CONNECTION HOLDINGS, INC.,**  
**Plaintiff,**

**INDEX NO. 115950/06**

**-against-**

**MOTION DATE \_\_\_\_\_**

**MOTION SEQ. NO. 001**

**OMABUILD CORPORATION,**  
**Defendant.**

**The following papers, numbered 1 through 4, were read on this motion for summary judgment:**

<u>NUMBERED</u>	<u>PAPERS</u>
Notice of Motion, Exhibits	1
Notice of Cross-Motion, Exhibits	2
Affirmation in Opposition	3
Reply Affirmation	4

**Upon the foregoing papers, it is ordered that the motion is granted in part and denied in part and the cross-motion is granted in part and denied in part.**

This negligence action arises from water damage to a retail store leased to plaintiff French Connection Holdings, Inc. (French Connection, plaintiff) by defendant owner Omabuild Corporation (Omabuild, defendant). In the underlying complaint, plaintiff alleges negligence, gross negligence, breach of contract, breach of the covenant of quiet enjoyment, and *res ipsa loquitur*. In the instant motion for summary judgment, French Connection seeks an order dismissing Omabuild's seventh affirmative defense which requests dismissal on grounds that plaintiff is barred from relief by a waiver of

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subrogation in the commercial lease between the parties. French Connection also asks for a response to their request for interrogatories and discovery and inspection.

Omabuild cross-moves for dismissal of the complaint and cross-claims and, should the court deny this relief, for an additional 30 days to respond to French Connection's interrogatories. At issue in the motion and cross-motion is whether language in the commercial lease (the provision) is unilateral and therefore unenforceable as a matter of law.

French Connection claims the provision is unenforceable since it fails to meet the mutuality requirement imposed by General Obligations Law 5-321. The provision, at paragraph 9(e) of the lease, provides that

Nothing contained hereinabove shall relieve the tenant from liability that may exist as a result of damage from fire or other casualty. Notwithstanding the foregoing, including owner's obligation to restore under paragraph 9(b) above, each party shall look first to any insurance in its favor before making any claim against the other party for recovery for loss or damage resulting from fire or other casualty, and to the extent that such insurance is in force and collectible and to the extent permitted by law, Owner and Tenant each hereby releases and waives all right of recovery with respect to subparagraphs (b), (d), and (e) above, against the other or anyone claiming through or under each of them by way of subrogation or otherwise . . .

French Connection alleges that the provision exempts the lessor from liability for damages to person or property and is therefore void as against public policy pursuant to General Obligations Law §5-321. Plaintiff points out that the court has held that a waiver of subrogation in a commercial lease failed to meet the "mutuality test" when said lease required only a tenant, but not a landlord, to obtain insurance, regardless of whether the

landlord was in fact insured.

Omabuild replies that the provision does no more than require plaintiff-lessee and defendant-lessor to look to their own insurance policies before commencing a claim against one another. If the subrogation clause of the provision is enforceable, according to the Omabuild, the cross-motion should be granted and the complaint dismissed.

It is well settled that the proponent of a summary judgment motion must make a prima facie case showing entitlement to judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that would require a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557 [1980]).

A lease which requires the tenant to hold the landlord harmless from liability and places the entire obligation for insurance on the tenant cannot be enforced, since it relieves the landlord of responsibility for its own negligence (*A to Z Die Cutting v 319 McKibbin St.*, 232 AD2d 512 [2d Dept 1996]). General Obligations Law §5-321 states, in relevant part, that

any lease of real property exempting the lessor from liability for damages for injuries to person or property caused by or resulting from the negligence of the lessor, his agents, servants or employees, in the operation or maintenance of the demised premises or the real property containing the demised premises shall be deemed as void as against public policy and wholly unenforceable.

Here, however, the provision does no more than require each party to look first to any insurance in its favor before commencing a claim. This language cannot be said to

exempt the lessor for liability for damages. French Connection's reliance on *A to Z Die Cutting v 319 McKibbin St.* is unavailing, since the language of the lease before the court in *A to Z* plainly stated that the owner would carry no insurance or be obligated to the tenant for any repairs whatsoever (*A to Z Die Cutting, supra*). Since the provision in dispute herein is not unilateral, French Connection's motion for summary judgment is denied with respect to enforcement of the contract.

In its cross-claim, Omabuild urges that subrogation is an equitable doctrine that allows an insurer to stand in the shoes of its insured and seek indemnification from third parties whose wrongdoing has caused a loss (*Kaf-Kaf, Inc v Rodless Decorations, 90NY2d 654 [1997]*). While this is true, the court's inquiry does not end with the issue of probable indemnification. On these papers, defendant has not met its burden of demonstrating the absence of material issues with respect to each cause of action laid out in the complaint. Accordingly, the cross-motion for dismissal is premature and must be denied.

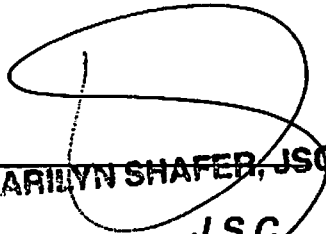
Plaintiffs request for interrogatories and discovery and inspection is granted. Defendant's request for an extension of 30 days to comply with the foregoing is also granted. Accordingly it is

ORDERED that plaintiff's motion for summary judgment is denied in part and granted in part; and it is further

ORDERED that defendant's cross-motion for summary judgment is denied in part and granted in part.

This reflects the decision and order of this court.

Dated: 1/3/08

  
HON. MARILYN SHAFER, JSC  
J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

**FILED**  
JAN 08 2008  
NEW YORK  
COUNTY CLERK'S OFFICE